Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

DALE LONG AND BETTY JO LONG
Petitioners,

v.

COTTRELL, INC. AND GENERAL MOTORS CORPORATION
Respondents,

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Is a new trial warranted where the lower courts allowed testimony of undisclosed experts and cross-examination of plaintiff based upon non-existent evidence of a phantom detour when the trial court admonished defendant outside of the presence of the jury with regard to such improper questioning but refused to issue a curative jury instruction thereby depriving petitioner of his constitutional rights.

II. Are constitutional rights violated by the empty chair defense where one defendant escapes liability in a summary judgment ruling yet the remaining defendant is allowed to blame at trial the dismissed party.

PARTIES TO THE PROCEEDING

Including the parties named in the caption of this Petition the parties are:

Petitioners: Dale Long and Betty Jo Long, individuals.

Respondents: Cottrell, Inc. ("Cottrell") and General Motors Corporation ("GM"), both corporations were parties to the proceedings before the United States District Court for the Eastern District of Missouri and the United States Court of Appeals for the Eighth Circuit. There is no parent or publicly held company which owns 10% or more of the stock of either Defendant.

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Eighth Circuit dated September 7, 2001, is set forth in the Appendix, (265 F.3d 663). The order denying rehearing entered on October 16, 2001, is set forth in the Appendix, The order of the United States District court for the Eastern District of Missouri dated April 17, 2000 is set forth in the Appendix.

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

The statutory provision for this Court's jurisdiction is 28 U.S.C. Section 1254. The United States Court of Appeals for the Eighth Circuit issued its Decision in this case on September 7, 2001. The motion for rehearing was denied on October 16, 2001. This Petition was timely filed.

CONSTITUTIONAL, STATUTORY AND ORDINANCE PROVISIONS INVOLVED IN THIS CASE

Constitutional Issues

1. Seventh Amendment of the United States Constitution

In suit at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law.

2. Fourteenth Amendment, United States Constitution

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United states; nor shall any State deprive any person of the life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

3. F.R.Civ.P. Rule 26

General Provisions Governing Discovery; Duty of Disclosure

(a) Required Disclosures, Methods to Discovery Additional Matter.

(1) Initial Disclosures. Except to the extent otherwise stipulated or directed by order or local rule, a party shall, without awaiting a discovery request, provide to other parties:

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, identifying the subject of the information;

* * *

Unless otherwise stipulated or directed by the court, these disclosures shall be made at or within 10 days after the meeting of the parties under subdivision (f). A party shall make its initial disclo-

sures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) Disclosure of Expert Testimony

(A) In addition to the disclosures required by paragraph (1), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703 and 705 of the Federal Rules of Evidence.

(B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specifically employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

Statutory Issues

STATEMENT OF THE CASE

Procedural History

On December 23, 1998, Dale Long, (hereinafter "the Petitioner"), a resident of filed his complaint against Cottrell, Inc. ("Cottrell"), and General Motors Corporation (hereinafter "GM") alleging negligence and strict liability. Defendants removed the action to the United States District Court of the Eastern District of Missouri on the basis of diversity pursuant to 28 U.S.C. 1332.

On September 22, 1999, GM filed a Motion For Summary Judgment to which the Petitioner filed a response on October 25, 1999. On April 17, 2000, the District Court granted the motion.

On May 17, 2000, the case proceeded to trial with Cottrell as the sole Defendant as the product manufacturer. A verdict was returned finding no fault by either the Plaintiff or the Defendant on both the negligence and strict liability counts.

Plaintiff filed his notice of appeal on October 16, 2000, to the Eighth Circuit Court of Appeals. The verdict and summary judgment in favor of GM was affirmed on September 7, 2001. Petitioner sought rehearing en banc on September 21, 2001. The motion for rehearing was denied on October 16, 2001.

The Petitioner has filed a Petition for Certiorari to this Honorable Supreme Court based upon the issues and argument presented herein.

Statement of the Facts

A. Cottrell Appeal

This is an action for personal injuries sustained by an automobile transport driver, while "untying" an automobile that was secured to the transport by means of a ratchet system. This ratchet system consisted of a chain-winding gear or "ratchet head" which turned with the use of a lever or "tie down bar," and a ratchet mechanism at the end of the ratchet head. This ratchet system required the use of manual force to secure or "tie down" an automobile. During this tie down process a device known as a "dog" or "pawl" fell into the teeth of the ratchet head as the head was turned by the operator. This dog would then prevent the release of the pressure from the compressed automobile suspension as the tie down bar rotated the ratchet head.

The Plaintiff here was injured while attempting to unload an automobile from his trailer. The use of the ratchet system in the unloading or "untying" process is the reverse of the tie down process with an important exception. In the untying process the operator must exert manual force on the tie down bar and then hold that pressure with one hand.

With the other hand the operator must lift the dog to allow for the release of pressure transferred from the automobile suspension via the chain to the ratchet system.

The ratchet system described above was the type installed on the trailer in question when it was manufactured. Cottrell, however, and other trailer manufacturers created a "quick release" ratchet system which

eliminated the need to exert pressure on the tie down bar with one hand while lifting the dog with the other hand during the untying process. The quick release ratchet was not on Plaintiff's trailer. Plaintiff testified he would not have sustained his career ending injury if his trailer had been equipped with a quick release ratchet. Cottrell offered no evidence to rebut this. Instead Cottrell claimed that, although the quick release ratchet had been patented in 1979, the automobile manufacturers would not allow for its use until 1992.

During trial Cottrell's counsel cross-examined Plaintiff regarding the accident facts. Through this cross-examination Cottrell sought to establish Plaintiff had detoured on his trip to "overnight" at Plaintiff's home. Plaintiff's driver logbook for this trip did not support such suggestion.

When it became apparent Defendant was suggesting Plaintiff had falsified his logbooks in violation of federal regulations and that Plaintiff had "overnighted" at his home, Plaintiffs' counsel objected. The objection was initially overruled but eventually the trial court asked for a showing of such evidence to support such questioning. Defendant's counsel produced a document from Plaintiff's personnel file dated 4/30/97 five months prior to the accident date. Thereupon the court concluded such evidence did not support Defendant's suggestion of detour.

Plaintiffs' counsel requested an instruction from the court for the jury to disregard the line of questioning. The court denied this request. Defendant proceeded to cross-examine Plaintiff similarly after Plaintiffs' objection had been sustained. Defendant specifically asked if Plaintiff had injured himself at home. After recessing

for the day, the court allowed Defendant to make an offer proof. During this offer of proof the court admonished Defendant's counsel for the line of questioning. The Court stated:

> "The Court: Let me tell you something, Mr. Howard. I don't think you're ethically allowed to ask the questions for which there is absolutely no basis in the evidence, and this question appears to me to have absolutely no basis in the evidence or in any semblance of an attempt at good faith, and that bothers me, and I don't want to see it again, and I'm going to let this lie because quite frankly I'm not going to instruct the jury, I don't think I'm going to instruct the jury about it and focus on it ... but I don't think you should ask questions unless you have some basis for believing that there is some truth to it."

Defendant's counsel responded:

> "Mr. Howard: I will indicate it is my belief in discussions with Allied personnel in fact that he was cited for doing just that, so I will defend my ethics very vigorously."

No Allied witness was ever disclosed in discovery by Defendant to support such belief or "citation."

On the following morning Plaintiff reiterated a request for a curative instruction and for a disclosure of the individual from Allied who purportedly informed Defendant's counsel of a basis for a good faith belief in the detour. Again, no Allied witness was identified. Plaintiffs' request for a curative instruction was denied again.

Plaintiffs' expert testified that the chain and ratchet tie-down system was unreasonably dangerous, because it required a dangerously high force level to be exerted by the driver in order to operate it. She testified Plaintiff would not have been injured if he had not been required to exert the high force levels.

Defendant's vice-chairman, Mr. Feldman, testified for Defendant. He was not timely or properly disclosed as a Rule 26(a)(2)(B) expert. He testified regarding trailer test loadings and regarding the proper way to tie down a vehicle. He testified that Plaintiff's procedure was definitely not proper. He testified regarding industry developments, automobile design changes, changes in laws and the effects on trailer design including discussions of the industry prior to his involvement in the industry. He testified to the physical effects of damage to automobiles' suspensions if vehicles are overtightened. He criticized Plaintiffs' expert and explained what an engineer "expert" should know regarding regulations. He testified regarding force level measurements taken by Defendant's engineer litigation expert. He testified regarding product development by other companies as well as problems the other companies encountered. He was allowed to testify, over Plaintiffs' objection, to the need for trailer design approval by the automobile manufacturers.

Defendant's witness has no engineering degree. He criticized force measurements obtained by Plaintiffs' expert. While he criticized Mr. Long for not following training he admitted he had no idea what training Plaintiff received.

At the conclusion of the evidence the jury returned a verdict finding no fault by the Plaintiff or the Defendant and awarded no damages.

B. GM Appeal

It is undisputed that the trailer was designed to haul GM automobiles. Plaintiff proved GM undertook to instruct the manufacturers of trailers regarding the proper design of those trailers and, specifically, the equipment used to tie down cars on those trailers. Plaintiffs presented an internal GM memo in which GM acknowledged its engineers were reviewing the design of the chain-and-ratchet tie-down system because the design was causing drivers to over-tighten the chains used as tie-downs. In this same memo, GM acknowledged that it would undertake to "instruct" manufacturers to include a special type of ratchet and that it would consider methods to retrofit existing trailers.

In response to GM's motion for summary judgment Plaintiffs proved at GM's "Haulaway Committees," a subcommittee created the "standards" for the trailer design. Plaintiffs proved GM's meeting minutes documented a presentation in which it was reported that tying down and loosening chains were related to 39.5 percent of injuries and that drivers typically exerted forces of between 100 and 280 pounds on tie-down bars. The minutes further noted that "it is strongly suggested that improvements/changes to the tie-down process be considered."

A Director of Safety listed as one of the topics to be considered by GM the development of a system for securing vehicles on haulaway equipment that did not require drivers to "use excessive force." The minutes

from 1987 note that the four-point tie-down system has a high driver injury frequency and is "very labour [sic] intensive."

In its Motion for Summary Judgment, GM acknowledged that, at the time Mr. Long was injured, he was using a ratchet system which did not have a quick-release device. Plaintiffs established that this quick-release device would eliminate the need for a driver to exert force during the untying process. GM did not dispute Plaintiffs' evidence that (a) a quick-release device, among other possible options, would have prevented Mr. Long's injury, and (b) GM prohibited the manufacturers of automobile transports to manufacture an alternative tie-down system.

GM initially contended, in its Motion for Summary Judgment, that there is no evidence that GM prohibited transport manufacturers from incorporating a quick-release mechanism in their products but then conceded its approval came long after the trailer was manufactured.

Plaintiffs submitted specific evidence in response to GM's motion that GM had prohibited other tie-down systems in addition to the quick-release ratchet. GM's summary judgment motion did not address such issues.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS RULED THAT A CORPORATION MAY EFFECTIVELY CIRCUMVENT THE EXPERT DISCLOSURE REQUIREMENTS OF F.R.CIV.P. RULE 26 BY ALLOWING A CORPORATE REPRESENTATIVE TO SUPPLY UNDISCLOSED EXPERT OPINIONS EVEN IF HE REGULARLY TESTIFIES IN LITIGATION FOR THE CORPORATION IN PRODUCT LIABILITY ACTIONS. THIS RULING IS CONTRARY TO F.R.CIV.P. RULE 26(a)(2)(B), IS IN CONFLICT WITH HOLDINGS FROM OTHER CIRCUITS, AND ALLOWS CORPORATIONS A FAVORED STATUS UNDER THE LAW.

II. THE LOWER COURTS CONDONED THE DEFENDANT'S UNSUPPORTED SUGGESTION THAT PLAINTIFF HAD NOT BEEN INJURED WHEN NO EVIDENCE EXISTED TO SUPPORT SUCH CROSS EXAMINATION. WHEN THE TRIAL COURT SUSTAINED THE OBJECTION TO THIS CROSS-EXAMINATION AN ADMONISHMENT TO DEFENDANT'S COUNSEL WAS ISSUED OUTSIDE OF THE JURY'S PRESENCE BUT CURATIVE INSTRUCTIONS TO THE JURY WERE REFUSED. BECAUSE THE JURY DETERMINED PLAINTIFF AND DEFENDANT WERE BOTH FREE FROM FAULT THE PHANTOM INJURY SUGGESTION MUST HAVE SERVED AS A SUBSTANTIAL BASIS FOR THE VERDICT AND THE DENIAL OF THE REQUEST FOR A CURATIVE INSTRUCTION DENIED PLAINTIFF OF HIS CONSTITUTIONAL RIGHTS. THIS RULING IS CONTRARY TO DECISIONS FROM OTHER CIRCUITS.

III. BECAUSE THE TRIAL COURT DISREGARDED PLAINTIFFS' EVIDENCE SUBMITTED IN OPPOSITION TO GM'S MOTION FOR SUMMARY JUDGMENT, GRANTED SAID MOTION YET ALLOWED THE REMAINING DEFENDANT TO BLAME GM AT TRIAL CONSTITUTIONAL RIGHTS OF THE PLAINTIFFS WERE VIOLATED WARRANTING CONSIDERATION BY THIS COURT AS TO WHETHER SUCH IS CONSTITUTIONALLY PERMISSIBLE.

Reason I Analysis

The lower court determined Rule 26(a)(2)(B) was not applicable to Defendant's witness, Elwood Feldman, because he was a corporate representative. This ruling ignores the plain language of Rule 26(a)(2)(B).

Plaintiffs proved Elwood Feldman is the corporate representative who testifies on a regular basis for Defendant and has admittedly testified on at least 12 occasions prior to 1998. He testifies on behalf of Cottrell in "basically all product liability claims." When his lack of disclosure was immediately pointed out to Defendant counsel waited until the close of discovery to attempt to disclose the witness as an opinion witness for trial. Even then the disclosure wholly failed to meet Rule 26(a)(2)(B) requirements. No signed report, testimony list, publication list or document list was ever provided. This disclosure is mandatory under F.R.Civ.P. Rule 26(a)(2)(B).

There exists a split among the circuits regarding the interpretation of Rule 26(a)(2)(B). Here the Appellate Court held said Rule inapplicable to a corporate representative. In the Sixth Circuit exclusion is mandatory

where Rule 26(a)(2)(B) compliance is not made. *Bowe v. Consolidated Rail Corporation*, 230 F.3d 1357 (6th Cir. 2000). Accord *Smith v. Union Pacific Railroad Co.*, 168 F.R.D. 626 (N.D. Ill. 1996). In the Seventh Circuit exclusion is mandatory unless the sanctioned party shows justification or that the non-disclosure was harmless. *Salgado v. General Motors Corp.*, 150 F.3d 735, 742 (7th Cir. 1998). In the Fourth Circuit it is reversible error to admit testimony or records not properly disclosed under Rule 26(a) and (b).

Certain Underwriters at Lloyd's, London v. Sinkovich, 232 F.3d 200, 202 (4th Cir. 2000). Various courts have strictly interpreted Rule 26. *Nguyen v. IBP, Inc.*, 162 F.R.D. 675 (D. Kan. 1995); *Elgas v. Colorado Belle Corp.*, 179 F.R.D. 296 (D. Nev. 1998). Employees of a party are subject to Rule 26(a) disclosure obligations. See *Minnesota Mining and Manufacturing Co. v. Signtech, USA, Ltd.*, 177 F.R.D. 459 (D. Minn. 1998). If the employees receive their regular salary while testifying they are "retained" within the meaning of Rule 26(a)(2)(B). *Smith v. State Farm Fire and Casualty*, 164 F.R.D. 49 (S.D. W.V. 1995). Government employees are subject to Rule 26 disclosures. *In re Air Crash at Charlotte, North Carolina on July 2, 1994*, 982 F.Supp. 1086 (S.C. 1997).

The multitude of published decisions providing different interpretations to Rule 26 has led one court to comment "as at Alice's Restaurant, one can find what one wants." *Sullivan v. Glock, Inc.*, 175 F.R.D. 497, 505 (D. Md. 1997). The ruling here, however, goes beyond any reasonable interpretation of Rule 26. The Eighth Circuit's ruling allows a corporation, but not an individual, to avoid Rule 26 disclosures by parading in a

"corporate representative" to testify without proper disclosure. This decision places corporations and individuals on unlevel playing fields, a result that cannot pass muster under constitutional Due Process or Equal Protection scrutiny. This Honorable Court shall address this disparity.

Reason II Analysis

In *Giglio v. United States*, 405 U.S. 150 (1972), this Honorable Court held that it is a violation of a party's constitutional Due Process rights for the government to fail to disclose evidence relating to the location and identity of known witnesses. In *Mooney v. Holohan*, 294 U.S. 103, 112 (1935), this Court made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with "rudimentary demands of justice." This was reaffirmed in *Pyle v. Kansas*, 317 U.S. 213 (1959). In a criminal proceeding, a new trial is required under Due Process standards if the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury. *Napue v. Illinois*, 360 U.S. 264 (1959). In 1993 the Federal Rules of Civil procedure were amended to require automatic disclosure, by parties in civil litigation, of the identity and location of persons with knowledge of discoverable information. F.R.Civ.P. Rule 26(a).

Precedents from multiple jurisdictions reveal that it is clear that questioning by counsel that improperly places prejudicial information before a jury generally entitles the aggrieved party to a new trial. *McBryde v. Carey Lumber Company*, 819 F.2d 185 (8th Cir. 1987). Where any such improper questioning is an isolated incident the trial court acts properly by giving a curative instruction. *Id.*

Under Due Process requirements in civil litigation where a party improperly comments on extraneous matters a verdict should be set aside where there is a reasonable probability that such influenced the jury. *Davis v. Mutual Life Insurance Company of New York*, 6 F.3d 367 (6th Cir. 1993) cert. denied 510 U.S. 1193. A trial court properly grants a new trial where a party creates a false impression regarding a known fact that was material to the case. *Bethel v. McAllister Brothers, Inc.*, 81 F.3d 376 (3rd Cir. 1996). The interjection of inadmissible evidence warrants a new trial even if a curative instruction is given as cautionary instructions do not always cure the prejudice. *Balanche Road Corp. v. Bensalem Township*, 57 F.3d 253 (3d Cir. 1995).

A new trial should be granted where the improper conduct of a party causes prejudice to the opposing party and unfairly influences a jury's verdict.

Alholm v. American Steamship Company, 144 F.3d 1172 (8th Cir. 1998). At minimum, the court should caution counsel and give an instruction to the jury to disregard such. *Id.* In assessing the effect of improper conduct by a party asserted as a basis for a new trial the court must examine the totality of circumstances including the verdict itself. *Portacgo Akueduct And Sewer Authority v. Constructora Lluck, Inc.* 169 F.3d 68 (1st Cir. 1999).

In *Higgins v. Hicks Company*, 756 F.2d 681 (8th Cir. 1985) defense counsel in closing arguments improperly suggested with no evidence that the accident victims had been drinking or taking drugs. The court held that such was improper but did not warrant a new trial noting that the trial court on at least two occasions issued proper curative instructions.

Application of the above principals warrants granting Plaintiffs a new trial. In the present action the jury determined that the Plaintiff, Dale Long, was *zero* percent at fault. At minimum, the denial by the district court of Plaintiffs' repeated request for a curative instruction warrants a new trial. In a similar action wherein such did not occur, a verdict for the Plaintiff was returned and affirmed on appeal. *Ford v. GACS, Inc.*, 265 F.3d 670 (8th Cir. 2001).

In the present action Plaintiffs requested but did not receive a curative instruction and the jury was left with the suggestion, without any evidence to support same, that Plaintiff was injured at his home, detoured to his home and was reprimanded by his employer for the detour which never happened. Plaintiffs were entitled to disclosure prior to trial of the witness from Plaintiff's employer who informed Defendant of any such reprimand if such witness really existed. F.R.Civ.P. 26(a). The jury finding of no fault by the Plaintiff reflects the prejudicial effect of such unsupportable questioning.

F.R.Civ.P. Rules 16(f) and 37 authorize a district court to prohibit the admission of evidence proffered by the disobedient party. Such power to exclude witnesses or evidence not disclosed in compliance with a pretrial order is essential. *Sylla-Sawdon v. Uniroyal Goodrich Tire Co.*, 47 F.3d 277, 284 (8th Cir. 1995). The exclusion of undisclosed evidence and witnesses is automatic and mandatory unless the withholding party can show that its violation of Rule 26(a) was either justified or harmless. *Salgado v. GM*, 150 F.3d 735, 742 (7th Cir. 1998). See also F.R.Civ.P. Rule 37(a)(1) (exclusion mandatory). Because Defendant never claimed the lack of disclosure was justified and because the suggestion of the evidence was proven not harmless by the verdict,

this Honorable Court should consider this appeal to render it clear that such tactics are not tolerable under both the Federal Rules of Civil Procedure and the United States Constitution.

Reason III Analysis

If this Court determines that the Petitioner's Writ of Certiorari should be granted, the Court must determine whether it is constitutionally incorrect for a Court to determine that an entity that controls a product design may escape liability for alleged defects in the design yet the other Defendant-manufacturer may blame the dismissed Defendant at trial for regulating the design. The decisions by the lower courts granted and affirmed the summary judgment ruling in favor of the non-manufacturer on the basis of lack of duty. But still allow the remaining Defendant was permitted to blame the non-manufacturer at trial for regulating the design. This is in direct conflict with Petitioner's right to a trial by jury and Due Process. Moreover, the bigger impact is the effect to product users who effectively are left without a remedy in situations where one company designs a product in compliance with another company's specification.

By granting GM's summary judgment motion here the lower courts engaged in a weighing of the evidence. Petitioner submitted ample evidence in the summary judgment proceeding including the testimony of the co-Defendant. The trial court determined said evidence was insufficient to allow the claim against GM to proceed to trial but then allowed the remaining Defendant to present essentially the same evidence at trial to establish GM's control or regulation of the product design.

A summary judgment motion is appropriate when there is no genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505 (1986). A dispute is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Id.* A fact is "material" if a dispute over it might affect the outcome of the suit under the governing law. *Id.*

The Petitioner's case against GM should have never been disposed of upon a summary judgment motion. The lower court's actions were an abuse of discretion because the Petitioner by way of depositions, affidavits and other competent evidence showed a substantial amount of evidence to prove his claim.

Since summary judgment was improperly granted in favor of GM, the Petitioner's constitutional right to a jury trial was violated. See *Page v. Work*, 290 F.2d 323, 334 (9th Cir. 1961), *cert. denied*, 368 U.S. 875 (1961). The lower courts' approval of the remaining Defendant to then blame GM at trial violated Petitioner's Due Process rights. The jury trial is not merely a procedural device, but, a fundamental right and an essential element of self government which the drafters of the Bills of Rights sought to preserve. To safeguard that right from judicial usurpation, the Seventh Amendment prohibits federal courts from taking away the role of the jury. Consistent with the textual mandate of the federal constitution's Seventh Amendment that the right to a jury trial be preserved in suits "at common law," this Honorable Court, in interpreting the Seventh Amendment, (1) asks whether the court is dealing with a cause of action that either was tried at law at the time of the founding fathers or is at least analogous to one that was;

and (2) if the action in question belongs in the law category, then asks whether the particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it existed. *City of Monterey v. Delmonte Dunes*, 526 U.S. 687, 119 S.Ct. 1624 (1999).; *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376, 134 L.Ed. 2d 577, 116 S.Ct. 1384 (1995). In order to preserve the right to a trial by jury the Petitioner's case must be heard by jury.

Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to jury trial should be scrutinized with the utmost care. *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935); *Chauffeurs, Teamsters and Helpers v. Terry*, 494 U.S. 558 (1990). So vital is this great constitutional right that "it is only in exceptional cases and for specific causes that a party may be deprived of it. *Grand Chute v. Winegar*, 82 U.S. 373, 375 (1872); *Jacob v. New York City*, 315 U.S. 752, 752-753 (1942). The right of jury trial in civil cases at common law is a . . . right so fundamental and sacred to the citizens that it should be zealously guarded by the courts." *Id.*

This Honorable Court has been highly protective of the jury's role: "Credibility determinations, the weighing of the evidence, and the drawing of inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment . . . the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. *Anderson, supra*, at 255. It would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence and judge the credibility

of witnesses. *Id.* The lower court granted GM's motion based upon an erroneous weighing of the evidence. A genuine issue of material fact exists as to whether GM participated in the design of the product. The lower courts simply ignored Petitioner's direct evidence and concluded, based upon the purported lack of evidence, that GM owed no duty. Petitioner submits the finding of no duty was premised upon a disregard of Petitioner's clear evidence and such finding cannot be allowed to stand.

Multiple decisions from various state Supreme Courts have addressed the constitutionality of the so-called "empty chair" defense in the context of situations where the non-party was never sued but sought by the Defendant to be blamed at trial. Courts holding such improper under state constitutional or statutory provisions include *Bell v. Glock, Inc.*, 92 F.Supp.2d 1067 (D. Mt. 2000); *Wethington v. Wellington*, 781 F.Supp.2d 1379 (S.D. In. 1991); *Wall v. Cherrydale Farms, Inc.*, 9 F.Supp. 784 (E.D. Mi. 1998); *Plumb v. Fourth Judicial District* Court, 279 Mont. 363, 927 P.2d 1011 (Mont.Sup.Ct. 1996); *State ex rel Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 715 N.E.2d 1062 (Ohio Sup.Ct. 1999); *Richards v. Owens-Illinois, Inc.*, 14 Cal.4th 985, 928 P.2d 1181 (Cal.Sup.Ct. 1997); and *Best v. Taylor Machine Works*, 179 Ill.2d 367, 89 N.E.2d 1057 (Ill.Sup.Ct. 1997). Many of these decisions hold the empty chair defense violative of state constitutional provisions but no case could be found where this Honorable Court has analyzed this significant issue under United States Constitutional provisions. Here, the lower courts allowed for trial tactics which are more egregious than those declared unconstitutional by many state courts. Here Plaintiffs actually sued GM but it

escaped liability on summary judgment. The allowance by the lower courts to permit the remaining Defendant to blame GM at trial smacks of constitutional violations. Accordingly, Plaintiff respectfully request review by this Honorable Court.

This Honorable Court must grant this Petition for Certiorari so that it may clarify the standard for a motion for summary judgment where a lower court weighs or disregards evidence, utilizes such as a basis for dismissing one Defendant and then allows the remaining Defendant to blame the dismissed Defendant at trial. Such legal inconsistency begs for redress by this Honorable Court.

CONCLUSION

The Eighth Circuit and the Eastern District Court of Missouri have placed a high burden of proof upon the Petitioner to overcome a summary judgment motion. The Court should grant *certiorari* to review this important matter, clarify the parties burden, order a proper remedy for the Petitioner, reverse the Eighth Circuit's and District Court's opinions, and order that the Petitioner has a constitutional right to a jury trial since there was an improper weighing or disregard of Petitioner's evidence. Additionally, the Court should grant *certiorari* to clarify and establish that under the Federal Rules of Civil Procedure its is improper a party to present expert opinions not previously disclosed under Rule 26, to cross examine a party with non-existent evidence and the failure by the trial court to issue a curative instruction upon determining such has occurred warrants a new trial where harm was reflected in the verdict as the failure to grant a new trial violates constitutional rights of the innocent party.

RESPECTFULLY SUBMITTED,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 00-3628
Dale W. Long; Betty Jo Long,
Appellants,

v.

Cottrell, Inc.; General Motors Corporation,
Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri.

Submitted: May 17, 2001
Filed: September 7, 2001

Before WOLLMAN, Chief Judge, HANSEN, Circuit Judge, and BARNES, [1] District Judge.

HANSEN, Circuit Judge.

Following a jury verdict in favor of Cottrell, Inc., (Cottrell) in this products liability case, Dale W. Long and Betty Jo Long appeal the district court's [2] denial of their motion for a new trial. The Longs also appeal the district court's pretrial grant of summary judgment in favor of General Motors Corporation (GM). We affirm the district court's rulings.

I.

Dale Long hauled new automobiles for his employer, Allied Systems, until September 24, 1997, when he

[1]The Honorable Harry F. Barnes, United States District Judge for the Western District of Arkansas, sitting by designation.

[2]The Honorable Catherine D. Perry, United States District Judge for the Eastern District of Missouri.

allegedly sustained a back injury while untying, or releasing, a Ford vehicle from his automobile transport trailer. Cottrell manufactured the trailer Mr. Long was using at the time he was injured. The trailer was equipped with a manual ratchet device that tightened chains attached to each corner of the vehicles being transported, thus securing the transported vehicles to the trailer.[3] The manual ratchet required the driver to exert significant levels of force to tighten and untighten the chains.

The manual ratchet device used on Mr. Long's trailer was developed in the 1940s. There has been an ongoing effort within the industry to develop better and safer mechanisms for securing hauled vehicles to trailers during transport. The GM Haulaway Committee, which includes employees from GM, carriers that haul GM vehicles, and trailer manufacturers, is one such group, and it has met regularly for years to share new ideas and concepts in an ongoing attempt to improve automobile shipping. Studies concerning injuries to drivers during the tying and untying processes were reported at various GM Haulaway Committee meetings during the late 1970s and 1980s. GM Haulaway subcommittees were involved in testing equipment designed by the trailer manufacturers.

The Longs premise their claims of liability against Cottrell on its failure to equip its trailers with a quick release ratchet and against GM on GM's alleged ban on carriers from using a quick release ratchet on trailers hauling GM vehicles. The quick release ratchet is a

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[3]For a more detailed description of how the ratchet works, see *Ford v. GACS, Inc.*, No. 00-1043, 2001 WL___, slip op. at 2-3 (8th Cir. 2001).

device that effectively eliminates the need for the driver to exert high levels of force on the ratchet when untying a vehicle. Two other trailer manufacturers received patents for a quick release ratchet in 1979, but neither ratchet was implemented into a trailer at that time, partly because GM did not approve of its carriers using the quick release ratchet because of potential damage to the hauled vehicles. GM required that equipment used to haul its new vehicles be approved by GM and comply with procedures outlined in GM's shipping manual. The manual explained the proper procedure for tying down vehicles to avoid damage to the vehicles. The manual did not address safety issues, however, but was given to the haulers for the purpose of "assist[ing] in the attainment of our mutual goal of delivering a damage-free product." (J.A. at 112.)

Cottrell developed a quick release ratchet in 1992 that was approved by GM in 1993 and became standard throughout the industry. All trailers manufactured by Cottrell after 1993 were equipped with the quick release ratchet. Mr. Long's trailer was manufactured by Cottrell in 1988. Long's employer did not retrofit his trailer with the quick release ratchet, although retrofitting was possible, and Mr. Long continued to use the manual ratchet until the time of his injury in 1997.

The Longs brought this products liability suit against Cottrell as the designer and manufacturer of the ratchet and against GM for influencing the design of the ratchet. The Longs claimed that the ratchet was defectively designed in that it required excessive force to operate. The district court granted GM's motion for summary judgment and the case proceeded to trial against Cottrell. The jury returned a verdict in favor of Cottrell on the

Longs' products liability and negligence claims. The Longs appeal the denial of their motion for a new trial, arguing that evidentiary issues entitle them to a new trial. They also argue that GM's influence over the design of the ratchet and rejection of the quick release ratchet at the time that Mr. Long's trailer was manufactured in 1988 subjected GM to liability under both the products liability and negligence causes of action and thus, GM should not have been granted summary judgment.

II. Motion for a New Trial Against Cottrell

The Longs argue that they were prejudiced by an improper line of questioning that lacked any evidentiary basis and that suggested that Mr. Long detoured home the night before his injury and sustained his injury there. During Mr. Long's cross-examination, Cottrell's attorney questioned Mr. Long about whether he stopped overnight at his home instead of staying in Columbia, Missouri, as he had testified and as was reflected in his log books. The Longs' attorney objected to the line of questioning, which the district court overruled finding the inquiry to be proper cross-examination. Defense counsel then asked Mr. Long if he had ever been reprimanded for misusing his employer's equipment, to which the Longs' attorney again objected. Out of the jury's hearing, the district court asked Cottrell's attorney if he had any basis to support the line of questioning. The district court rejected Cottrell's offer of proof that a reprimand five months prior to the accident date for misusing equipment and an alleged corroborating statement by an undisclosed Allied employee provided any basis for questioning whether Mr. Long had driven home without permission, The district court sustained the objection but refused the Longs'

attorney's request for a curative instruction, not wanting to emphasize the testimony to the jury. Cottrell's next two questions to Mr. Long were:

> Q. The first stop you had this day, wherever you spent the night, was at Riverside, correct?
>
> A. Yes.
>
> Q. Let me ask you this. Did you hurt yourself at home that day?
>
> A. No, I hurt myself unloading the vehicle at Riverside. I was not at home that day.

(Tr. at 14 1.) Cottrell made no further mention of Long detouring home throughout the rest of the trial.

Mr. Long testified on redirect examination that he had never been reprimanded for detouring to his home without permission from his employer and that he did not in fact stay at his home the night before the injury, an assertion supported by his log books. Long's wife testified that Mr. Long had never driven his truck home and that it would have been utterly impossible for him to do so because they lived on an unlevel gravel road, and the low clearance of the trailer would have prevented Long from driving the trailer to their home.

The district court denied the Longs' motion for a new trial based on this line of questioning because it occurred during cross-examination after Mr. Long had given conflicting or "confused" testimony about how the injury had occurred, Long and his wife were given full opportunity to refute the allegation, and, to the extent the questioning was improper, "it was surely a minor point in a long trial, and the jury could not have been

influenced by it." *Long v. Cottrell, Inc.*, No. 4:99CV181 CDP, at 3 (E.D. Mo. Oct. 5, 2000) (order denying motion for new trial).

Improper questions that place prejudicial information before the jury may entitle the aggrieved party to a new trial. *McBryde v. Carey Lumber Co.*, 819 F.2d 185, 188 (8th Cir. 1987). "The trial court ... has discretion in determining whether a question is so prejudicial to require a new trial 'because the trial court is in a far better position to measure the effect of an improper question on the jury than an appellate court which reviews only the cold record.'" *Id.* (quoting *Williams v. Mensey*, 785 F.2d 631, 637 (8th Cir. 1986), in turn quoting *Harris v. Zurich Ins. Co.*, 527 F.2d 528,531 (8th Cir. 1975)). We thus limit our review to abuse of discretion. *Id.*

We do not believe the district court abused its discretion in denying a new trial based on this line of questioning, even without a limiting instruction. The district court refused the instruction in an effort to avoid focusing the jury's attention on the line of questioning. Further, as the district court noted, Mr. Long and his wife both refuted any inference that he detoured home and hurt his back there, the questions before the jury were minimal, and it occurred on the first of a five day trial. Cottrell never again brought up the issue of whether Mr. Long detoured home, either during trial or during closing arguments. Based on our review of the cold record, we defer to the district court's "superior vantage point" as the line of questioning was not "plainly unwarranted and clearly injurious." *Alholm v. Am. S.S. Co.*, 144 F.3d 1172, 1181 (8th Cir. 1998) (internal quotations and citations omitted)). "Additionally, any suggestion

that [Cottrell] withheld evidence [of the corroborating Allied employee] would not require a new trial because the issue was raised on cross examination and the jury had a full opportunity to hear evidence from both sides which it could evaluate." *Id.* at 1182.

The Longs also argue that they are entitled to a new trial because the district court erroneously allowed Cottrell's vice-chairman, Elwood Feldman, to testify despite Cottrell's failure to properly disclose him as an expert. The district court denied the Longs' request for a new trial because it found that Feldman testified as a fact witness only and did not testify as an expert.

The district court has wide discretion in deciding whether to allow the testimony of witnesses not listed prior to trial, and any such decision will be overturned only if it results in a clear abuse of discretion. *Boardman v. Nat'l Med. Enters.*, 106 F.3d 840, 843 (8th Cir. 1997). Even if Feldman should have been precluded from offering expert opinion testimony, such preclusion would not affect his ability to testify as a fact witness. *See Easley v. Anheuser-Busch, Inc.*, 758 F.2d 251, 258 (8th Cir. 1985) (holding that the district court erred in preventing in-house experts from testifying as fact witnesses, though properly excluded as expert witnesses for failing to comply with discovery, despite difficulty in separating fact and opinion testimony). The district court denied the Longs' pretrial motion to bar Feldman from testifying, ruling that he would be allowed to testify as a fact witness and any issues regarding opinion testimony were best left for trial. However, the Longs never objected during Feldman's testimony on the basis that he gave improper opinion testimony. To the extent the Longs have preserved this issue, *see*

McKnight v. Johnson Controls, Inc., 36 F.3d 1396, 1406-07 (8th Cir. 1994) (limiting review to plain error where party did not object to expert's testimony), we reject the argument. *Compare Jackson v. City-of St. Louis,* 220 F.3d 894, 897 (8th Cir. 2000) (refusing to consider an argument that a fact witness was erroneously allowed to testify as an undisclosed expert where the defendant did not object during the witness's testimony).

Even if Feldman has testified in numerous other products liability cases for Cottrell, Rule 26(a)(2)(B) was not triggered because the testimony he gave in this case was not expert in nature. *See* Fed. R. Civ. P. 26(a)(2)(B) (requiring expert disclosure for a witness "whose duties as an employee of the party regularly involve giving expert testimony" (emphasis added)). Feldman testified based on his first-hand experience from working in the industry and his involvement in Cottrell's design and testing processes. Cottrell did file a Supplemental Rule 26 Disclosure Statement after the expert discovery deadline, listing Feldman as a potential expert witness and offering his opinion that the ratchet was not unreasonably dangerous when put to its intended use and that Long improperly used the ratchet. Upon review of Feldman's trial testimony, however, we do not find, nor have the Longs directed us to, passages in the transcript where Feldman testified at trial to those opinions listed in the disclosure. Feldman did not testify at all about the safety of the ratchet. The only testimony by Feldman regarding whether Long improperly used the ratchet was Feldman's testimony that pulling on the ratchet as hard as one could, as Long had testified, was not proper procedure or protocol, based on Feldman's experience as a trailer manufacturer and his personal knowledge of Ford's tie-down procedures. (Tr.

at 594.) *See Brandt Distrib. Co. v. Fed. Ins. Co.*, 247 F.3d 822, 825-26 (8th Cir. 2001) (holding that Rule 26 was not implicated where a fire captain who investigated a particular fire testified that the fire was a "fraud fire" because the conclusion was a logical inference from his investigation, the captain did not opine who might have set the fire, and the defendant had not retained the captain as an expert).

The Longs also claim that Feldman offered opinions regarding state of the art in the industry, what other manufacturers were creating, the feasability of alternatives, and lack of complaints about the ratchet. Although the Longs have not directed us to the specific testimony wherein they believe Feldman offered these opinions, our review reveals that Feldman's testimony was based on his personal knowledge and was not in the form of expert opinion. To the extent that Feldman discussed what other trailer manufacturers were doing in the industry, his testimony was expressly limited to his own knowledge and experience. Similarly, any testimony about the feasibility of alternative designs was limited to Feldman's experience with Cottrell in its efforts to design alternative systems. Contrary to the Longs' assertion that Cottrell admitted in its Response to Plaintiff s Motion for New Trial that Feldman testified that there were no other complaints about the ratchet being defective, the Response actually states that "Mr. Feldman's testimony ... consisted of efforts by Cottrell to develop a quick-release ratchet, *not* 'opinions' regarding ... the lack of complaints regarding product defect. Mr. Feldman... provided *no* testimony regarding 'lack of complaints regarding product defect.'" (J.A. at 1149-50 (emphasis added).) Our review of Feldman's trial testimony comports with Cottrell's version of the

testimony rather than the Longs' mischaracterization. We have carefully reviewed Feldman's trial testimony and agree with the district court that it was factual and not expert in nature. The district court did not abuse its discretion in denying the Longs' motion for a new trial.

III. Summary Judgment in Favor of GM

The district court granted GM's motion for summary judgment, finding that GM did not design or manufacture the allegedly defective ratchet, thus precluding the Longs' strict liability claims, and that GM owed no duty to Mr. Long, thus precluding the Longs' negligence claims. In this appeal, the Longs argue that there is a genuine issue of fact regarding whether GM prohibited use of the quick release ratchet, which arguably would have prevented Mr. Long's injury. The Longs also argue that GM can be held liable in strict liability based on its influence of the design of the ratchet and in negligence because Mr. Long's injury was foreseeable to GM.

We review the district court's grant of summary judgment de novo. "Summary judgment is proper where, viewing the evidence in the light most favorable to the non-moving party, there are no genuine issues of material fact in dispute." *Larsen v. Mayo Med. Ctr.*, 218 F.3d 863, 866 (8th Cir.). *cert. denied*, 121 S. Ct. 625 (2000).

Another panel of our court recently addressed this same issue in a suit against GM and a different trailer manufacturer. *See Ford v. GACS, Inc.*, No. 00-1043, 2001 WL ___, (8th Cir. ___, 2001). That case involved an injury to Mr. Ford, an automobile hauler, while he was untying a vehicle from his transport trailer using a manual ratchet device nearly identical to the ratchet used by Long. Like Long, Mr. Ford argued that GM

prohibited use of a quick release ratchet, which would have prevented his injury. Mr. Ford made the same arguments and cited the same cases in his appeal of the district court's grant of summary judgment in favor of GM. We reject the Longs' appeal for the same reasons our previous panel rejected Mr. Ford's. As discussed in *Ford*, Missouri courts require that an entity place a product in the stream of commerce before it can be liable under a products liability claim. *See Ford*, slip op. at 13-15; *see also* Mo. Rev. Stat.§ 537.760(1); *Bailey v. Innovative Mgmt. & Inv., Inc.*, 916 S.W.2d 805, 807 (Mo. Ct. App. 1995). Viewing the evidence in the light most favorable to the Longs, GM did not design the allegedly defective ratchet, but merely rejected alternatives designed and offered by others as not meeting its needs. Whatever influence GM may have had over the design of the ratchet, it was insufficient under Missouri law to hold GM strictly liable for any alleged defect.

The *Ford* court also rejected a negligence claim against GM, holding that GM owed no duty to Mr. Ford. *See Ford*, slip. op. at 15-16. Mr. Ford argued that his injury was foreseeable to GM based on reports at GM Haulaway Committee meetings of injuries from tying and untying vehicles and a general concern in the industry about driver injuries, much the way the Longs argue it here. "The common denominator which must be present [in a negligence action] is the existence of a relationship between the plaintiff and defendant that the law recognizes as the basis of a duty of care." *Parra v. Bldg. Erection Servs.*, 982 S.W.2d 278, 283 (Mo. Ct. App. 1998) (internal quotations omitted). The Longs have failed to point us to any basis in Missouri law that would supply the requisite duty owed by GM to the employee of the

company GM hired to haul its vehicles.[4] For the reasons discussed by our court in *Ford*, we reject the Longs' negligence claim against GM. The district court correctly granted summary judgment in favor of GM.

IV.

For the foregoing reasons, we affirm the district court's judgments.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

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[4]Summary judgment for GM is even more warranted in this case. GM approved the use of a quick release ratchet on trailers hauling its vehicles in 1993, nearly four years before Long was injured, whereas Ford was injured before GM approved of the quick release ratchet. Long's employer chose not to retrofit his trailer with a quick release ratchet, although retrofitting was possible. Even if GM owed some duty to Long, we doubt Long would survive the proximate cause element of his negligence claim. *See Lopez v. Three Rivers Elec. Co-op., Inc.*, 26 S.W.3d 151, 155 (Mo. 2000) (en banc) (listing elements of a negligence claim under Missouri law).

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No.00 - 3628

Dale W. Long; Betty Jo Long,
Appellents,

vs.

Cottrell, Inc.; General Motors Corporation,
Appellees.

Appeal from the United States
District Court for the
Eastern District of Missouri

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court. (5172-010199)

September 7, 2001

A true copy

ATTEST :

/s/ Michael E. Garis

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No.00-3628

Dale W. Long; Betty Jo Long,
Appellants,

V.

Cottrell, Inc.;
Appellee,

Pennsylvania Precision Cast Parts Inc.;
Defendant,

General Motors Corporation;
Appellee,

C.F. Bender Company; Unknown,
Defendants,

Order Denying Petition for
Rehearing and for Rehearing
En Banc

The petition for rehearing en banc is denied. Judge McMillian, Judge Loken, and Morris Sheppard Arnold did not participate in the consideration or decision of this case.

The petition for rehearing by the panel is also denied, (5128-010199)

October 16, 2001

Order Entered at the Direction of the Court:

/s/Michael E. Garis

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

DALE W. LONG, et al.,
Plaintiffs,
v.
COTTRELL, INC., et al.,
Defendants.

Case No. 4:99CV181 CDP

MEMORANDUM AND ORDER

This order deals with the motion of defendant General Motors Corporation ("GM") for summary judgment. Plaintiffs oppose the motion. Because the Court concludes that on the undisputed material facts, GM is entitled to judgment as a matter of law, the Court will grant GM's motion.

I. Background

On September 24, 1997, plaintiff Dale W. Long was performing his duties as a car hauler employed by Allied Systems, Inc. Mr. Long alleges that at the time of his injuries, he was attempting to loosen a chain which secured a vehicle on the trailer in order to unload the vehicle. Plaintiff states that he put his winch bar in the hole of the ratchet and, that while pushing down on the winch bar and reaching to release the dog (or pawl), he sustained an injury to his back. The ratchet system on Mr. Long's trailer was a conventional, manually operated ratchet which did not have a quick release system, A quick release system is used to engage the teeth of the ratchet barrel during the tightening process and also to hold the ratchet in place until unloading. The quick

release system requires the driver, at unloading, to insert a winch bar into the end of the quick release and pull the bar to release the tension on the ratchet. Plaintiff contends his injuries would not have occurred had his trailer been equipped with a quick release system.

Mr. Long and his wife Betty Jo Long brought suit on December 23, 1998, in the Circuit Court of St. Louis against four defendants, Cottrell, Inc., Pennsylvania Precision Cast Parts, Inc., General Motors Corporation and C.F. Bender Company. Defendants removed the action to federal court on February 5, 1999. C.F. Bender has since been dismissed from the lawsuit. Mr. Long brought several claims against GM, including strict liability and negligence claims. Ms. Long brought claims for loss of consortium paralleling her husband's claims. Plaintiffs also brought claims of breach of implied warranty and loss of consortium based on that breach in counts V and VI, which plaintiffs have now chosen to abandon in their response to GM's motion for summary judgment.

The manufacturer of the automobile trailer at issue in this case was Cottrell, Inc. General Motors did not manufacture the trailer. Plaintiffs contend that GM is liable, however, because it allegedly participated in the design, testing, and approval of features for automobile trailers.

Plaintiffs contend this participation took several forms, including the General Motors shipping manual which GM provided to carriers. The introduction of the 1997 shipping manual stated that a "complete understanding of and adherence to the requirements of this manual will assist in the attainment of our mutual goal of

delivering a damage-free product," The manual did contain shipping specifications for haulaway transportation of General Motors vehicles. These specifications included the requirement that all vehicles be tied-down with four chains, the prohibition of hydraulics to tighten chains, the maximum length of the tie-down bar, the type of steel from which the ratchet and pawl were to be manufactured, and the need for all newly manufactured trailer equipment to be equipped with positive locking pawl ratchets for chain tie-down devices. The manual does not address avoidance of personal injury during the shipping process.

Plaintiffs also contend that GM participated in trailer designing and testing through the "Haulaway Committee." The Haulaway Committee was a group composed of personnel from General Motors, car hauling companies, and trailer equipment manufacturers which would meet to discuss -vehicle shipping. The main purpose of the Haulaway Committed was to improve shipping. At times, it does appear topics of discussion or presentation included reports on driver safety and injury.

General Motors did retain the ability to decide if a new shipping device or piece of equipment was appropriate for use in shipping a General Motors vehicle prior to its use. In 1993, GM approved the use of quick release ratchets in securing vehicles on trailers.

II. Summary Judgment Standards

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is appropriate if there 's no genuine issue of material fact and if the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *Celotex*

Corp. v. Catrett, 477 U.S. 317, 322 (1986). Once the moving party has met this burden, the nonmoving party may not rest on the allegations in its pleading but by affidavit or other evidence must set forth specific facts showing that a genuine issue of material fact exists, Fed. R. Civ. P. 56(e). In determining summary judgment, the facts and the inferences from those facts are viewed in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). At the summary judgment stage, courts do not weigh the evidence and decide the truth of the matter, but rather determine if there is a genuine issue for trial. *Anderson*, 477 U.S. at 249. Rule 56(c) mandates the entry of summary judgment against a party, if after adequate time for discovery, that party fails to make a showing sufficient to establish the existence of an essential element of the case that the party will have the burden of proving at trial. *Celotex* 477 U.S. at 322-23.

III. Discussion

Count I: Strict Liability

In count I, Mr. Long alleges that GM is strictly liable in products liability because the trailer at issue was manufactured, designed, distributed, approved, and tested by defendants GM and Cottrell, and at the time of its manufacture and after, the trailer and ratchets were defective, Plaintiff also alleges that GM prohibited the use of certain alternative load securement systems. Ms. Long claims loss of consortium based on Mr. Long's claim of strict products liability. General Motors claims that plaintiffs' claims fail because it is not among the class of persons which can be held strictly liable to plaintiffs in this situation.

Strict products liability in Missouri is defined by statute. According to section 537.760, Mo. Rev. Stat., in order to be held strictly liable in Missouri, "the defendant, wherever situated in the chain of commerce, [must have] transferred a product in the course of his business."[1] Strict liability is imposed on those placing a product in the stream of commerce, whether by means of a sale or not. *Bell v. Poplar Bluff Physicians-Group, Inc.*, 879 S-W.2d 618, 619 (Mo. Ct. App, 1994). The "nature of the transaction serves as the basis of strict liability in tort and not the name by which it is called." *Gabbard v. Stephenson's Orchard, Inc.*, 565 S.W.2d 753, 758 (Mo. Ct. App. 1978)(holding that a lessor or bailor for mutual benefit of the parties in a commercial transaction comes under the rule of strict liability irrespective of sale). Instead, "it is the defendant's participatory connection, for his personal profit or other benefit, with the injury-producing product and with the enterprise that created consumer demand for and reliance upon the product which calls for the imposition of strict liability." *Gunderson v. Sani-Kem Corp.*, 674 S.W.2d 665, 668 (Mo. Ct. App. 1984)(internal citations omitted). For example, in *Wright v. Newman*, the Eighth Circuit held that a financing institution was not strictly liable for a defective towing ball attached to an automobile which it had repossessed because the financing institu-

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[1] Section 537.760 is a codification of section 402A of the Restatement (Second) of Torts, *Rodriquez v. Suzuki Motor Corp.*, 996 S.W.2d 471,65 (Mo. 1999). Before the legislature passed section 537.760 in 1987, however, the Missouri Supreme Court had adopted strict liability as stated in section 402A of the Restatement (Second) of Torts. *Bell v. Poplar Bluff Physicians Group. Inc.*, 879 S.W,2d 618, 620 (Mo. Ct. App. 1994). Therefore, cases in which the events occurred before 1987 are still instructive in illuminating the concept of strict products liability in Missouri.

tion was in a different relationship to the product and the consumer than were commércial entities responsible for distribution. 735 F.2d 1073, 1078 (8th Cir. 1984).

General Motors argues that it was not in the chain of commerce that transferred the trailer and cannot be strictly liable. Plaintiffs contend that GM was in the chain of commerce because GM, allegedly participated in the design of the ratchet system by specifically testing the system and participating in the Haulaway Committee which determined that alternative hydraulic tie down systems could not be used. Plaintiffs argue that GM benefited financially because the trailers are used to carry GM vehicles. Plaintiffs further claim that the approval of the designs was necessary before the trailers could be placed in the stream of commerce.

In this case, although plaintiff has presented a wealth of evidence supposedly supporting its arguments, the Court believes there are no genuine disputes of material fact. GM was a customer of the independent auto haulers who obtained the auto hauling trailers from the trailer manufacturers. General Motors specified the manner in which its vehicles were to be shipped. In addition, GM had to approve a mechanism before that particular mechanism could be used to haul GM vehicles. By doing so, however, GM did not become a designer or manufacturer of the trailer or become any part of the chain of commerce responsible for transferring trailers in the course of its business.[2] Plaintiffs

[2] The case at bar is not a case in which the customer is the person or company who designed the product and then hired a contractor merely to fabricate and install the product precisely in accordance with the customer's specifications, as in *Bloemer v. Art Welding Co. Inc.*, 884 S.W.2d 55 (Mo. Ct. App. 1994).

have cited no case law that imposes strict liability on an entity in the position of GM. The Court agrees with the conclusion of the Western District of Missouri in its August 9, 1999, order in the case of *Ford v, GACS, Inc.*, No. 98-0489-CV-W-2, that "it would be an improper extension of Missouri law to hold defendant strictly liable for injuries caused by the tie-down system it did not manufacture or design simply because it approved the use of the system to transport its vehicles." Consequently, the Court will grant defendant's motion for summary judgment regarding plaintiffs' claims based on strict liability.

Counts III and IX: Negligence

In count III, Mr. Long claims that GM and other defendants owed him and others similarly situated a duty to design, test, and manufacture ratchets and trailers with due care for the safety of plaintiff and others similarly situated, and that GM was negligent in violating that duty, In count IX, Mr. Long alleges that GM voluntarily assumed a duty to participate in designing, approval and/or testing alternative vehicle securement systems for use on automobile carrier trailers, and had an obligation to undertake this duty in reasonable fashion with due regard for the safety of users of said trailers. Plaintiff claims that GM was negligent in violating that duty. In count XI, Mr. Long claims GM breached the alleged duty in count IX with conscious disregard. Ms. Long claims loss of consortium based on the above claims in counts IV, X, and XII.

Plaintiff claims in Count III that GM was negligent in that it violated a duty it owed plaintiff and those like him to design, test, and manufacture ratchets and trailers with due care for the safety of plaintiff and

others. In order to prove negligence in Missouri, a plaintiff must establish that (1) a duty existed on the part of defendant to protect the plaintiff from the injury of which he complains; (2) the defendant failed to perform that duty; and (3) the injury to the plaintiff was the proximate result from that failure. *Dix v. Motor Market Inc.*, 540 S.W.2d 927, 932 (Mo. Ct. App. 1976). Negligence only exists if a reasonably prudent person would anticipate the danger and provide against it. *Bunker v. Association of Missouri Elec. Cooperatives*, 839 S.W.2d 608, 611 (Mo, Ct. App. 1992). The issue of whether a duty existed is a matter of law and a question for the court. *Id.* A relationship must exist between the plaintiff and the defendant that the law recognizes as the basis of a duty of care[3]. *Id.* While a duty exists when a general type of event or harm is foreseeable, no court has defined duty as being coextensive with foreseeability. *See Claxton v. City of Rolla*, 900 S.W.2d 635, 636 (Mo. Ct. App. 1995); *Asaro v. Cardinal Glennon Mem'l Hosp.*, 799 S.W.2d 595, 598 (Mo. 1990).

Plaintiffs have cited no authority in which an entity in a position similar to that of GM owed a plaintiff a duty of due care. It is true that in *Chubb Group of Insurance Companies v. C.F. Murphy & Associates Inc.*, the Missouri Court of Appeals held that designers, supervisors, contractors, sub-contractors, and manufacturers of the

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[3]Several public policy factors should be examined in determining whether a duty exists, including: (1) the social consensus that the interest is worthy of protection; (2) the foreseeability of harm and the degree of certainty that the protected person suffered injury; (3) moral blame society attaches to the conduct; (4) the prevention of future harm; (5) consideration of cost and ability to spread the risk of loss; (6) the economic burden upon the actor and the community and others. *Hoover's Dairy, Inc. v. Mid-America DairyMen, Inc.*, 700 S.W.2d 426, 432 (Mo. 1985).

elements used in roof supports of an arena were under a duty to third parties to exercise due care. 656 S.W.2d 766, 774 (Mo. Ct. App. 1983). General Motors, however, does not fall into any of these categories because it was not a designer or manufacturer of the ratchets or trailers in question.

Plaintiffs cite three cases from other states and circuits for support of their contention, however none of these cases mirrors the situation of GM. In *Kosters v. Seven-Up Co.*, the trial court had submitted a theory of negligence to the jury in which a franchisor could be held liable for the negligence of its supplier. 595 F.2d 347 (6th Cir. 1979), It was unclear whether the jury accepted the negligence theory in finding the defendant liable because it was a general verdict, but in any case, the defendant did not appeal the theory of negligence. The case proceeded on appeal on the question of whether the franchisor could be held liable for breach of implied warranty of the supplier. Thus, this case provides no guidance to this Court because GM is not franchisor and because the Sixth Circuit did not even speak to negligence. Plaintiffs also cite *Snyder v. American Association of Blood Banks,* 659 A.2d 482 (N.J. Super. Ct. App. Div. 1995), and *Weigland v. University Hospital,* 659 N.Y.S.2d 395 (N.Y. Sup. Ct. 1997), for support. In both of these cases, the courts held that the American Association of Blood Banks ("AABB") could be considered negligent to persons transfused with HIV blood because the AABB set the standards for testing blood for all of its member blood banks. The case at bar is not similar in that GM did not set the safety standards for the industry of trailer manufacturers as did the AABB for blood banks.

Plaintiffs do cite cases from Missouri in which the courts recognized a duty based on section 323 of the Restatement (Second) of Torts. Section 323 concerns the negligent performance of an undertaking to render services and states:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
>
> (a) his failure to exercise such care increases the risk of such harm, or
>
> (b) the harm is suffered because of the other's reliance upon the undertaking.

In these cases, one who acts gratuitously or otherwise is liable for the negligent performance of an act, even though no duty to act existed originally. *Strickland v. Taco Bell Corp.*, 849 S.W.2d 127, 132 (Mo. Ct. App. 1993).

General Motors did not render services to the drivers of the auto haulers which would be necessary for the protection of the drivers or the driver's things. General Motors did not train the drivers in any way, much less provide safety training. The shipping manual GM provided to the hauling companies contained nothing about safety of drivers or prevention of injury. While evidence exists demonstrating that at times, people gave presentations or reports at Haulaway Committee meetings concerning driver safety or injuries, this does not prove

that GM was rendering safety services for the drivers of the trailers. Thus, General Motors did not provide services to the drivers which were necessary for their protection and is not liable under the theory of negligence of section 323 of the Restatement (Second) of Torts. The Court finds that no duty existed on the part of GM to provide for the safety of the drivers of the car trailers and summary judgment will be granted on counts III and IV.

In count IX, plaintiff claims that GM voluntarily assumed a duty to participate in the designing, approval, and/or testing alternative securement systems and was negligent in breaching that duty. Although plaintiff has not specified the exact theory of negligence on which his claim is grounded, section 324A of the Restatement (Second) of Torts, which provides a basis for liability, states:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
>
> (a) his failure to exercise reasonable care increases the risk of such harm, or
>
> (b) he has undertaken to perform a duty owed by the other to the third person, or
>
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

In order to be negligent under part (a) of the section 324A, the defendant must have assumed a duty. In *Brown v. Michigan Millers Mutual Insurance Co., Inc.*, the court found that the defendant insurance company had assumed a duty to inspect grain elevators and could therefore be held liable for negligently performing the assumed duty which resulted in injuries. 665 S.W.2d 630 (Mo. Ct. App. 1983). The court pointed to evidence that the insurer assumed the duty from the operator of the grain elevator, including advertisements in which the insurance company stated "your Mill Mutual engineer is specially trained ... to lower probability [of accidents] substantially. He will examine your property and offer suggestions that over the years have helped others avoid disastrous losses..."*Id.* at 634 (alterations in original). Plaintiffs have not demonstrated that GM assumed the duty of making the trailers safe for drivers. While evidence suggests that some discussion occurred at the Haulaway Committee meetings concerning safety and injuries, this does not rise to the level necessary to prove that GM assumed a duty. General Motors did not offer advice on safety precautions to the manufacturers or haulers in their manual or at the Haulaway Committee meetings, and therefore did not assume a duty which could make it liable under part, (a) of section 324A. *See Peeler v. DeWitt,* 3 S.W.3d 894 (Mo. Ct. App. 1999).

General Motors also does not incur liability under part (b) or (c) of section 324A. Plaintiffs have not provided evidence sufficient to create a dispute of material fact regarding whether GM assumed any duties that the manufacturers or haulers might have had for the safety of the drivers, In order to establish a claim under part (b), it is not enough that a party merely intended to supplement the duty of the other party or assist the

other party in performing the other party's duty. *Plank v. Union Elec. Co.*, 899 S.W.2d 129, 130 (Mo. Ct. App, 1995), It is necessary that one must intend to completely subsume or supplant the duty of the other party in order to incur liability for nonperformance of that duty. A valid cause of action under 324A(b) requires a showing of "intent to become the primary provider of a service for the protection [of] a third person, and not merely a showing of intent to assist or supplement the service provided by the other." *Id.* at 132. Plaintiffs have not brought forward evidence to show that GM supplanted other parties' duties for safety of the drivers, therefore GM is not negligent under section 324A(b). General Motors also is not negligent under 324A(c). Plaintiffs have not provided any evidence that the manufacturers, haulers, or drivers relied on GM to provide for the safety or prevent injuries to the drivers. The Court will therefore dismiss counts IX and X.

In count XI, Mr. Long complains that GM committed the alleged negligence in count IX with conscious disregard. Ms. Long claims loss of consortium based on the same accusation in count XII. In Missouri, in cases of negligence, punitive damages may be awarded if the defendant showed complete indifference or conscious disregard for the safety of others. *Lewis v. FAG Bearings Co.*, 5 S.W.3d 579, 583 (Mo. Ct. App. 1999); *Barnett v. La Societe Anonyme Turbomeca France*, 963 S.W.2d 639, 659 (Mo. Ct. App. 1998). As the Court will grant summary judgment on the underlying claim of negligence in counts IX and X, so shall the Court grant summary judgment on this pleading for punitive damages based on that alleged negligence in counts XI and XII.

Count VII: Punitive Damages

In counts VII and VIII, plaintiffs claim they are seeking punitive damages, apparently in conjunction with their claims under strict liability in counts I and II and under negligence in counts III and IV. Although each count also seeks additional compensatory damages in addition to punitive damages, plaintiffs insist that these counts are not based on any additional legal theories, but simply seek punitive damages. As the Court will grant summary judgment on the underlying claims, so too will the Court grant summary judgment on counts VII and VIII.

Accordingly,

IT IS HEREBY ORDERED that defendant General Motors Corporation's motion for summary judgment [57-1] is granted.

IT IS FURTHER ORDERED that plaintiff's motion to strike General Motors Corporation's reply to plaintiff's response to the motion for summary judgment [#66-1] is denied.

IT IS FURTHER ORDERED that General Motors Corporation's joinder in defendant Cottrell's motion in limine concerning similar act evidence [#116-1] is denied as moot.

s/Catherine D. Perry
Catherine D. Perry

UNITED STATES DISTRICT JUDGE

Dated this 17th day of April, 2000.